

REMARKS

The present Amendment is in response to the final Office Action mailed October 17, 2008. A Petition for a three-month extension of the term for responding to said Office Action up to and including April 17, 2009 is transmitted herewith. A request for continued examination is also submitted herewith.

Claims 1, 3, 4, 9-12, and 16-17 were rejected in the Action. Claims 1 and 16 have been amended herein to further clarify the claimed invention. Support for all claim amendments can be found in the specification in at least paragraphs [0054]-[0058]. Claim 10 has been cancelled and no claims have been added herein. Therefore, Claims 1, 3, 4, 9, 11-12, and 16-17 remain pending in the present application. The following sets forth Applicants' remarks relating to the currently pending claims and the outstanding Action.

In the Action, the Examiner rejected claims 1, 3, 4, 9-11 under 35 U.S.C. 102(e) as being anticipated by U.S. Patent Pub. No. 2003/0125739 to Bagga *et al.* ("Bagga"), claim 12 under 35 U.S.C. 103(a) as being unpatentable over Bagga in view of U.S. Pat. No. 6,551,316 to Rinner *et al.* ("Rinner"), claim 16 under 35 U.S.C. 103(a) as being unpatentable over Bagga in view of U.S. Pat. No. 6,261,296 to Aebi *et al.* ("Aebi"), and claim 17 under 35 U.S.C. 103(a) as being unpatentable over Bagga in view of Aebi in further view of U.S. Patent No. 5,401,269 to Buttner-Janz *et al.* ("Buttner-Janz"). In short, the Examiner asserted in the Action his belief that each and every one of the currently pending claims were either anticipated or obviated by the cited prior art. Applicants respectfully disagree with the Examiner's assertions, especially in light of the above amendments of certain the currently pending claims.

First, independent claims 1 and 16, as previously presented, required fork-shaped extensions each including an interior side having a curved profile. Contrary to the Examiner's indications, this curved profile is not disclosed or suggested in Bagga. The Examiner asserted on page 2 of the Action, that Figs. 4, 12 and 15 show the perimeter surface of the implant are rounded and thus, the instrumentation having the forked shaped extensions that engage the implant "would be curved or have a curved profile." Here, the Examiner makes a conclusory assertion regarding the teachings of Bagga without any support. Just because the perimeter surface of the implant disclosed in the above mentioned figures are rounded, does not mean the interior sides of the forked shaped extensions are necessarily curved or have a curved profile. The sides of many of the implant designs taught in Bagga include cut-outs that aid in the connection with flat forked-shaped extensions. In fact, the distraction instrument specifically referred to by the Examiner in Figs. 26 and 27 includes just that. As such, Applicants respectfully point out that at least these limitations of claims 1 and 16 are not met by Bagga.

Nonetheless, in the hopes of expediting prosecution of the present case, Applicants have amended independent claims 1 and 16 to more clearly define the structure of the plying device or instrument of the present invention. Specifically, independent claims 1 and 16, as amended, now recite that a notch is formed in the curved profile of the interior sides of the forked shaped extensions. In this regard, Applicants direct the Examiner to Fig. 10 of the present application, clearly showing notch 6240 formed in the curved profile 6300 of a U-shaped member or forked shaped extensions 6230. Paragraph [0057] of the originally filed specification further states:

Also particularly, the U-shaped member 6230 of fork 6200 has an interior side (i.e., the side facing opposite fork 6200) defined by a notch 6240 and curved profile 6300, which notch allows passage of the vertebral body stops 4202 of the inserter/impactor 4000 as the disc 160 is inserted, and which curved profile permits passage of the convex dome 184a, 184b of the disc 160 as the disc is inserted. (emphasis added).

The Examiner asserted in the Action that Fig. 25 of Bagga shows the extensions having a "notch" since they do not lie in the same plane as the base of the extension and the forks extend up and outward from the base. However, this is far different from what is shown and described in the originally filed specification and now set forth in claims 1 and 16. The Examiner is giving the term "notch" an interpretation well outside of the broadest reasonable interpretation. There is no structure in Bagga capable of achieving the result described in the above mentioned paragraph of the present application.

Therefore, Applicants respectfully assert that amended claim 1 is unanticipated by Bagga because that reference simply does not disclose or suggest forked shaped extensions having an interior side with "a curved profile and a notch formed in the curved profile." For the foregoing reasons, Applicants respectfully assert that claim 1, as amended, overcomes the rejections set forth in the Action. Moreover, claims 3, 4, 9, and 11-12 are unanticipated, *inter alia*, their dependence from claim 1 an unanticipated base claim. A dependent claim is necessarily narrower than the claim from which it depends. Such claims may also include subject matter even more clearly not taught or suggested by Bagga. Applicants reserve the right to argue such at a later date, if necessary.

Further, Applicants respectfully assert that a *prima facie* case of obviousness cannot be made with respect to amended independent claim 16 utilizing Bagga. Simply put, as is set forth above in the discussion pertaining to claim 1, Bagga fails to disclose or even suggest the limitations added to claim 16 in the present amendment. Aebi cannot be used to cure the deficiencies of Bagga. Thus, Applicants respectfully assert that claim 16, as amended, overcomes the obviousness rejections in view of the combination of Bagga and Aebi. Claim 17 is unobvious because of its dependence from claim 16, as well as because of the patentable nature of the additional limitations set forth therein.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

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Respectfully submitted,

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